103. EchoStar asserts that the transaction will raise barriers for new entrants into the video programming market in two ways. First, EchoStar contends that integration of News Corp.'s programming with DirecTV's distribution will reduce or eliminate DirecTV's incentives to carry new programming that competes with News Corp.'s programming.[300] EchoStar also asserts that the transaction will foreclose an important outlet for new entrants, because DirecTV is currently the largest MVPD that is not affiliated with a programmer, and because DirecTV offers a nationwide distribution network which allows niche programming to reach a target audience that is geographically broad.[301] CDD agrees, claiming that independent producers, unaffiliated motion picture studios, and syndicators will be competitively disadvantaged by News Corp. after the transaction.[302] Victory Sports, which operates an RSN and is not vertically integrated with an MVPD, expresses concern that that the vertical integration of DirecTV's satellite distribution platform and News Corp.'s RSNs could discourage good faith negotiations for fair market value prices for independent RSN offerings.[303] Similar concerns were expressed with respect to the ability of Latino-themed English language and bilingual networks to gain access to DirecTV by the Congressional Hispanic Caucus.[304]

104. Commenters contend that News Corp.'s discrimination against unaffiliated cable networks will harm the public by reducing the diversity of programming available to viewers. NRTC is particularly concerned about the transaction's effects on viewers in rural areas. NRTC asserts that if the Application is approved, News Corp. could become an essential facility for content developers' distribution of programming to rural America.[305] According to NRTC, as one of only two MVPDs serving un-cabled rural areas and the only such MVPD with programming holdings, News Corp. could control the programming available in rural areas by denying distribution to competing content providers.[306] CDD asserts that if the transaction is approved, certain safeguards must be imposed to ensure that unaffiliated programmers have access to DirecTV's platform, including requiring Applicants to make "channel and related capacity" available on a non-discriminatory basis to unaffiliated programmers that lack market power; requiring that non-broadcast local (commercial and non-commercial) programmers have access to Applicants' spot-beam capacity; and requiring Applicants to increase the amount of national footprint capacity available to non-commercial entities beyond what is required by our public interest obligations for DBS licensees.[307]

105. NAB asserts that the transaction will give DirecTV the incentive and ability to

[300] EchoStar Petition at 39.

[301] EchoStar Petition at 39-40. *See also* NRTC Petition at 14 (asserting that competing content developers may need access to the DirecTV platform to reach enough people to make distribution economically feasible).

[302] CDD Petition at 3.

[303] *See* Letter from Kathleen M.H. Wallman, counsel to Victory Sports, LLC, to Marlene H. Dortch, Secretary, FCC (Oct. 17, 2003).

[304] *See* Letter from Ciro Rodriguez, Chairman, Congressional Hispanic Caucus to John Ashcroft, U.S. Attorney General, U.S. Department of Justice, Michael K. Powell, Chairman, FCC and Commissioners (Dec. 9, 2003) at 2.

[305] NRTC Petition at 14.

[306] NRTC Petition at 14.

[307] CDD Nov. 7, 2003 Ex Parte at 3. *See also* 47 CFR § 100.5.

discriminate against broadcast stations other than Fox O&Os.[308] NRTC asserts that News Corp. will have less economic incentive to deliver local signals in markets where it does not have an O&O or an affiliate.[309] NAB and NRTC claim that consumers will be harmed by the resulting reduction in programming, particularly local programming and programming available to rural consumers. Commenters contend that News Corp.'s discrimination against competing television broadcast stations will harm the public by reducing the diversity of programming available to viewers and by limiting viewer access to local programming.[310] With respect to the Applicants proposed condition that the merged entity will not discriminate against "unaffiliated programming vendors with respect to price, terms, or conditions of carriage on the DirecTV platform,"[311] NAB contends the proposed condition is inadequate because it does not address potential discrimination against broadcasters, and urges the Commission to expand this condition to prohibit discrimination against broadcast stations as well as cable programmers.[312]

106. Applicants respond that these claims of vertical foreclosure against unaffiliated programmers are flawed because DirecTV simply lacks a large enough share of the MVPD market to foreclose an unaffiliated programmer. Such programmers would still be able to sell to MVPDs serving approximately 87% of subscribers nationwide. Moreover, such a strategy would only hurt DirecTV by reducing the attractiveness of its channel lineup. DirecTV's refusal to carry programming valued by consumers, regardless of its source, would only drive subscribers to competing MVPDs.[313] Applicants note that, even where this issue has arisen in the context of an MVPD with much higher market share – as in the proposed EchoStar-DirecTV merger, where the combined market share would have been about 20%—the Commission concluded that the transaction would not create purchasing market power over national or regional programmers.[314] Because the Commission has previously found 20% to be well below levels of concentration at which the Commission has historically had cause for concern, Applicants argue DirecTV's 13% MVPD market share should be dispositive.[315]

(ii) Discussion and Condition

107. Applicants have offered that "neither News Corp. nor DirecTV will discriminate against unaffiliated programming services in the selection, price, terms or conditions of carriage." We conclude that Applicants' proposed commitment to allow unaffiliated programmers access to the DirecTV platform on nondiscriminatory terms and conditions adequately addresses concerns raised regarding unaffiliated video programmers' access to the DirecTV platform. We will therefore condition our grant

[308] NAB Comments at 20-24. NAB asserts that News Corp. will have the ability and incentive to act as a gatekeeper to the detriment of unaffiliated content providers, including broadcast stations. *Id.*

[309] NRTC Petition at 15.

[310] NAB Comments at 20-24; NRTC Petition at 15.

[311] NAB Comments at 26.

[312] NAB Comments at 26.

[313] Applicants' Reply at 49.

[314] Applicants' Reply at 49 (citing *EchoStar-DirecTV HDO,* 17 FCC at 20655).

[315] *Id.*

of the Application on compliance with this access commitment.[316] At this time, we will not prescribe standards of conduct pursuant to which DirecTV must act to comply with this condition although we expect DirecTV to act reasonably when dealing with unaffiliated programmers. We note that Applicants' proposed commitment is not unlike the nondiscrimination requirement in the Act and our program carriage rules.[317] Similar to our treatment of the remainder of Applicants' proposed program access commitments in the following section, we clarify that aggrieved programmers and MVPDs may seek relief for any alleged violations of this condition by using the existing enforcement mechanisms found at Section 76.1003 of the Commission's rules.[318]

108. As to broadcast programming, we find it unlikely that, after the transaction, DirecTV would discriminate against competing television broadcast stations. The applicable statutory and regulatory provisions[319] thoroughly address satellite carriage of broadcast television programming. In any market in which DirecTV offers local-into-local service pursuant to the statutory copyright license, it is required to carry all television broadcast stations within that local market that request carriage.[320] The Commission's rules detail the technical terms of carriage, certain anti-discrimination provisions based on SHVIA, and the complaint process by which aggrieved parties can seek Commission redress if DirecTV has failed to meet its carriage obligations.[321] Alternatively, television broadcast stations that provide retransmission consent can negotiate the terms and conditions of carriage.[322] We reiterate that, under the SHVIA, we will, in reviewing carriage complaints against any MVPD, consider any unreasonable terms or conditions or negotiating procedures.[323]

4. Discrimination Against Unaffiliated MVPDs

a. Access to National and Non-Sports Regional Cable Programming Networks

(i) Position of Parties

109. News Corp. has interests in several satellite cable programming networks, including

[316] *See* Appendix F.

[317] We note that Applicants' proposed condition is not unlike the nondiscrimination requirement in the Act and our program carriage rules. *See* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[318] *See* 47 C.F.R. § 76.1003.

[319] *See, e.g.,* Satellite Home Viewer Improvement Act of 1999, PL 106-113, 113 Stat. 1501, Appendix I (1999).

[320] 47 C.F.R. § 76.66(b)(1).

[321] *See* 47 C.F.R. § 76.66(i) (channel position); 47 C.F.R. § 76.66(j) (manner of carriage) 47 C.F.R. § 76.66(m) (remedies).

[322] 47 C.F.R. § 76.65.

[323] *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 16 FCC Rcd 1918, 1928 (2000). In addition, as discussed in Section VI.C.4.c., below, we extend the good faith and non-exclusivity provisions of SHVIA as a condition of license transfer approval for so long as the program access rules are also in effect.

national programming networks offering sports, news, or general entertainment,[324] and regional programming networks that do not offer sports.[325] Applicants acknowledge that a vertical relationship could lead to anti-competitive results in the distribution market if a programmer discriminated against or refused to sell to unaffiliated MVPDs in order to gain competitive advantage for its affiliated MVPD. Applicants claim, however, that any such concern would be extremely attenuated in this case for five principal reasons: (1) News Corp. has no market power in the sale of video programming that would enable it to carry out such a strategy; (2) it would be commercially irrational for News Corp. and DirecTV to attempt foreclosure; (3) the program access rules prohibit News Corp. from engaging in such discriminatory conduct; (4) the parties are willing to accept a series of program access-like undertakings that will remain enforceable even if News Corp. ceases to be subject to the Commission's program access rules; and (5) vertical foreclosure strategies that involve News Corp. attempting to force its "sophisticated partners", including Hughes and the various co-owners of many News Corp. programming networks, to act against their self-interests, would not work because such self-dealing behavior is adequately protected against by "existing corporate governance and legal requirements."[326]

110. Applicants maintain that News Corp's affiliates' combined share of the programming market is too small for News Corp. to be able to exercise any type of market power. They cite prior Commission findings that the programming supply market is extremely competitive, with the growth rate of new programmers outpacing the growth of new channels on MVPD systems,[327] and they state that News Corp.'s share of national video programming services is relatively small (3.9%, or 10 of 257 services listed in the *2002 Video Competition Report*). Similarly, News Corp. holds an interest in only 32 of 339 (9.4%) of the national and regional services listed, and its interest in 12 of the 22 regional services is a non-controlling minority interest.[328] News Corp. claims that, under these circumstances, it lacks the ability, either now or after the transaction closes, to harm DirecTV's rivals.

111. Furthermore, Applicants claim that News Corp. lacks the incentive to do so, because a programmer's interests are in securing the widest possible dissemination of its programming in order to maximize the value of those assets – a value based on its ability to generate advertising revenue and per-subscriber fees. Affiliation with DirecTV would not change this, according to Applicants, because News Corp. would have to forgo programming sales to the remaining 87% of the MVPD market if it were to engage in foreclosure strategies. "Moreover, to the extent News Corp. denies unaffiliated MVPDs access to its programming, it gains only a fraction of any benefits generated for DirecTV (because of its

[324] The following is a list of national programming networks affiliated with News Corp. (News Corp.'s ownership share appears in parentheses only if it is less than 100%): Fox News Channel; FX; National Geographic Channel (66 2/3%; remaining 33 1/3% National Geographic Society); Speed Channel; Fox Movie Channel; Fox Sports World; Fox Sports en Espanol (37.8%; remaining 62% Liberty (10.6%) and Hicks Muse (51.6%)); Fox Sports Digital Networks; TV Guide Channel (42.9% indirectly owned through Gemstar, which owns 100%); TV Games Network (42.9% indirectly owned through Gemstar, which owns 100%). *See* Application at Attachment F.

[325] The following is a list of non-sports regional programming networks affiliated with News Corp. News Corp. holds a 40% interest in each network, while the remaining interest is held by Rainbow: MSG Metro Guide; MSG Metro Learning; MSG Traffic and Weather. *See* Application at Attachment F.

[326] Application at 54; Reply at 59.

[327] Application at 54, (citing *Cable Horizontal Order,* 14 FCC Rcd at 19104).

[328] Application at 55.

minority interest in Hughes), while it incurs most of the costs (through its 82% interest in FEG)."[329]

112. Applicants attempt to rebut allegations that News Corp. could raise prices for its programming to supra-competitive levels for all MVPDs by forcing DirecTV to accept such supra-competitive rates to use as a "benchmark" that other MVPDs must either also accept or face the loss of News Corp. programming. In addition to Applicants' argument that corporate governance will guard against such behavior, discussed in Section VI.C.2, *supra*, they also contend that such benchmarking should not be a concern for at least two other reasons: (1) News Corp. lacks the requisite market power to raise programming prices; and (2) the Commission has consistently found that its program access rules are sufficient protection against potential abuse in other transactions involving vertically integrated MVPDs.

113. Applicants concede that all of News Corp.'s national and regional satellite cable programming networks are already subject to the Commission's program access rules due to Liberty's approximately 17.6% interest in News Corp., and, in some cases, direct interests in those networks held by Liberty or another cable operator, and will continue to be if the proposed transaction is completed.[330] They also acknowledge that the program access rules would not apply to all of Fox's national satellite cable programming if Liberty Media divests its interest in News Corp. or sells its cable systems. Similarly, for the jointly-owned, regional networks to fall outside of the program access rules, the joint owner cable operators also would have to divest their interests for this programming.[331] Nonetheless, as a condition of approval, News Corp. offers to continue to be bound by the program access rules applicable to satellite cable program vendors should any or all of its programming otherwise fall outside of the Commission's program access jurisdiction.[332] News Corp. submits that it will not offer any of its existing or future programming services on an exclusive basis to any MVPD and will continue to make such services available on a non-exclusive basis and non-discriminatory terms and conditions.[333]

114. In addition, Applicants commit to not entering into exclusive arrangements for the distribution of an affiliated programming rights holder's satellite cable programming.[334] Applicants submit that this condition prevents them from making exclusive arrangements for Liberty's programming in the event Liberty is no longer bound by the program access rules for as long as Liberty holds its attributable interest in News Corp.

115. Similarly, Applicants state that they will not unduly or improperly influence the decision of an affiliated programming rights holder to sell its satellite cable programming to other MVPDs or the

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[329] *Id.* at 57.

[330] *Id.* at 57; citing 47 C.F.R. §76.1000-76.1003.

[331] *Id.* at 58.

[332] *Id.* An attributable ownership by a cable operator is the triggering point for application of the program access rules to satellite cable programming vendors.

[333] *Id.*

[334] Applicants define affiliated programming rights holder as either (1) a satellite cable programming vendor in which either Applicant holds a non-controlling attributable interest (*i.e.* 5% or greater), or (2) a satellite cable programming vendor holding a non-controlling, attributable interest in either Applicants. *Id.* at 61.

prices, terms and conditions of such sale. This condition extends the unfair practices prohibitions applicable to cable operators to News Corp.'s and DirecTV's dealings with affiliated programmers. Applicants propose that these commitments apply for as long as News Corp. has an attributable interest in DirecTV and the program access rules are in effect.[335]

116. Commenters assert that, because of harms arising from News Corp.'s increased incentive and ability to withhold its broadcast or cable network programming, the Application should be designated for hearing, denied, or, if approved, conditioned to prevent such harms.[336] EchoStar contends that News Corp. has market power in key segments of the programming market through its control of Fox News, Fox movies, and the non-news Fox Cable Networks such as FX.[337] EchoStar and ACA state that such content is among the "must have" programming that any MVPD needs if it is to be an effective competitor.[338] EchoStar also argues that Liberty, which has a strategic relationship to the Applicants and the instant transaction, controls other key programming assets, including the several Discovery and Encore channels.[339] ACA argues that transaction-specific program access problems include imposing more costly terms and conditions of program access on smaller cable operators and using "volume" discounts to justify favorable pricing for DirecTV and entering into exclusive programming arrangements targeted at DirecTV's smaller cable system competitors.[340] EchoStar maintains that News Corp. could bypass the program access rules by delivering its programming to its uplink facility terrestrially.[341] Commenters also question the ability of the Audit Committee to monitor every term of every agreement with an unaffiliated MVPD and do not consider the committee as a sufficient guard against the threat of unreasonable terms.[342]

117. To remedy the claimed deficiencies in the conditions proposed by Applicants, parties urge the Commission to adopt several revisions and additions. We will discuss revisions and additions suggested to apply to News Corp.'s cable programming in general here, and address these suggestions and proposed conditions specific to RSN or broadcast programming separately below.

118. Several commenters urge applying the program access rules permanently to News Corp. programming even if the general application of the rules terminates.[343] In addition, commenters and

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[335] Application at Attachment G.

[336] ACA Comments at 16, 20, 23; JCC Comments at 55-63; Cablevision Comments at 27-30; EchoStar Petition at 58-62; NRTC Petition at 20-22.

[337] EchoStar Petition at 22.

[338] EchoStar Petition at 22; ACA Comments at 16.

[339] EchoStar Petition at 22, 35, 71. *See also* CDD Petition at 4 (describing investments by Liberty in News Corp.).

[340] *See* Letter from Christopher C. Cinnamon and Emily A. Denney, Cinnamon Mueller, to Marlene H. Dortch, Secretary, FCC (Oct. 17, 2003) ("ACA Oct. 17, 2003 Ex Parte") at 7.

[341] EchoStar Petition at 59.

[342] Cablevision Comments at 29-30.; JCC Comments at 59-63; Letter from Consumers Union to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003) at 5-6 ("Consumers Union Sept. 23, 2003 Ex Parte").

[343] ACA Comments at 19; EchoStar Petition at 65; NRTC Petition at 21.

opponents contend that neither the program access rules nor the Applicants' proposed program access commitments will adequately protect against potential harms arising from the transaction.[344] They argue that the proposed program access conditions do not prevent News Corp. from raising the price of programming above competitive levels by simply requiring DirecTV to compensate News Corp. for its programming at unreasonably high prices with unreasonably favorable terms of carriage.[345] These parties observe that such a "sweetheart deal" would then establish unreasonable terms for agreements with all other MVPDs, without harm to DirecTV or News Corp., because it is effectively compensating itself.[346] Commenters and opponents are not convinced that the Applicants' Audit Committee will be able to monitor every term of every agreement with an unaffiliated MVPD and do not consider the committee as a sufficient guard against the threat of unreasonable terms.[347] ACA contends that the proposed commitment does not prevent News Corp. from offering different or more costly terms to small cable operators, because although the commitment requires nondiscrimination, News Corp. is likely to offer the same prices/terms/conditions only to MVPDs with as many subscribers as DirecTV.[348]

119. ACA urges the Commission to seek an enforceable commitment from Applicants that News Corp. will not use programming prices, terms and conditions to disadvantage smaller market cable companies.[349] Cablevision asks the Commission to revise the proposed program access commitment to prevent News Corp. from using "sweetheart deals" with DirecTV as an inflated benchmark programming price for the industry.[350] RCN requests that the Commission clarify that the term "Affiliated Program Rights Holder" refers not only to existing programming affiliates, but also to programmers that become affiliated with News Corp. or DirecTV in the future.[351] RCN also urges the Commission to clarify that, for enforcement purposes, aggrieved MVPDs may bring program access complaints against Applicants using the procedures found at Section 76.1003 of the Commission's rules.[352]

120. Consumers Union explains that News Corp.'s non-discrimination condition can be useful in preventing egregious competitive abuses such as selling Fox programming to DirecTV's competitors

[344] ACA Comments at 16, 20, 23; JCC Comments at 55-63; Cablevision Comments at 27-30; EchoStar Petition at 58-62; NRTC Petition at 20-22.

[345] Cablevision comments at 27-28; EchoStar Petition at 23-24; NRTC Petition at 21; JCC Comments at 59-63; CFA Reply Comments at 5-6.

[346] Cablevision comments at 27-28; EchoStar Petition at 23-24; NRTC Petition at 21; JCC Comments at 59-63; CFA Reply Comments at 5.

[347] Cablevision Comments at 29-30.; JCC Comments at 59-63; Letter from Consumers Union to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003) ("Consumers Union Sept. 23, 2003 Ex Parte") at 5-6.

[348] ACA Comments at 19.

[349] ACA Comments at 20-21; ACA Oct. 17, 2003 Ex Parte at Exhibit A, Page 2.

[350] Cablevision Comments at 2, 30; *See also* NRTC Petition at 21; Consumers Union Sept. 23, 2003 Ex Parte at 4-5.

[351] RCN Comments at 9; RCN Oct. 24, 2003 Ex Parte at 7.

[352] RCN Comments at 9-10. NRTC also urges the Commission to adopt enforcement mechanisms. NRTC Petition at 21.

at prices that are substantially and unjustifiably higher than the price paid by DirecTV.[353] Non-discrimination requirements alone, however, will not stop News Corp. from charging DirecTV an artificially high price for Fox programming and then requiring any MVPDs seeking to carry the programming to either pay a rate based upon that same high rate or allow DirecTV to become the major distributor of that programming in the MVPD's market, according to Consumers Union.[354] Consumers Union recommends that the Commission impose a restriction similar to what the Federal Trade Commission ("FTC") applied in the Time Warner/Turner merger. In that instance, Consumers Union avers, the FTC established a cable programming price index mechanism to evaluate whether the merging companies were raising programming prices at a more accelerated pace than their historic pattern.[355]

121. Pegasus urges us to condition approval of the Application on the following requirements designed to supplement those proposed by Applicants: (i) contracts between Fox and DirecTV would have to be approved by a majority of the independent directors of DirecTV and parent Hughes; (ii) all contracts between Fox and DirecTV would be filed with the Commission and available to the public; (iii) the economic terms of any contract between Fox and DirecTV would have to be set at the average of those charged to Fox's three largest, non-affiliated MVPDs. The CEO and directors of Fox, DirecTV, and Hughes would be required to certify compliance with these conditions annually. Pegasus asserts that these conditions should apply for a period of five years.[356]

122. EchoStar asserts that to the extent News Corp.'s ownership interest in Hughes is anticompetitive, any additional ownership interest would only exacerbate the problem. Accordingly, EchoStar urges the Commission to limit News Corp.'s equity position in Hughes to 34%.[357] EchoStar also urges the Commission to mandate independent programming authority at the DirecTV level by means of an independent board of directors that can withstand News Corp.'s influence,[358] and suggests several other measures to strengthen the Applicants' proposed program access conditions. These include: prohibiting satellite exclusives of any kind for News Corp. programming; applying the requirement to programming delivered terrestrially; extending the requirement to News Corp.'s current and future non-video and broadband offerings; making the requirement permanent; applying the access condition to Liberty's programming assets; clarifying that the nondiscrimination requirement applies to all non-price terms; requiring News Corp. to offer all programming separately, at published rates that are pre-approved

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353 Consumers Union Sept. 23 Ex Parte at 5.

354 Consumers Union Sept. 23 Ex Parte at 5.

355 CU Sept. 23 Ex Parte at 5-6 (citing Agreement Containing Consent Order, In the Matter of Time Warner Inc., Turner Broadcasting System Inc., Tele-Communications, Inc., and Liberty Media Corporation, File No. 961-004, Before the Federal Trade Commission (Sept. 12, 1996) at http://www.ftc.gov/os/1996/09/timewar.pdf).

356 *See* Letter from Kathleen M.H. Wallman, counsel to Pegasus Communications, to W. Kenneth Ferree, Chief, Media Bureau, FCC and Barbara S. Esbin, Associate Chief, Media Bureau, FCC at 2-3, transmitted by letter from Kathleen M.H. Wallman to Marlene H. Dortch, Secretary, FCC (Sept. 30, 2003) ("Pegasus Sept. 30, 2003 Ex Parte"); Letter from Kathleen M.H. Wallman, counsel to Pegasus Communications, to Marlene H. Dortch, Secretary, FCC (Dec. 10, 2003) (Pegasus Dec. 10, 2003 Ex Parte).

357 EchoStar Petition at 62-63.

358 EchoStar Petition at 63.

by the Commission.[359] EchoStar further proposes that the Commission prohibit the sharing of information between News Corp.'s programming divisions and DirecTV about any programming negotiation with a competing MVPD, subject to penalties.[360]

123. Applicants respond that they have neither the incentive nor the ability to engage in an anti-competitive strategy for any of their cable programming.[361] Applicants restate that DirecTV and News Corp. have insufficient power in their respective markets to support a strategy of withholding programming or abnormally raising its prices, and further the creation of creation of an independent audit committee will prevent some of the claimed anti-competitive conduct. Likewise, Applicants repeat that the program access rules and their proposed program access conditions are effective to prevent abuses, and therefore there is no need to regulate DirecTV differently than incumbent cable operators.[362] Applicants argue that all of the claimed anti-competitive strategies envisioned by the commenters assume either that the Commission's rules are totally ineffectual, or that News Corp. would simply violate the rules without being discovered. If there is a systematic flaw in the rules, Applicants contend the Commission should conduct a rulemaking instead of imposing conditions solely on one party.[363]

(ii) Discussion and Conditions

124. We conclude that the program access rules, combined with the Applicants' proposed program access conditions, will be sufficient to eliminate any potential for anti-competitive conduct due to the vertical relationship between News Corp's satellite cable programming networks and DirecTV's distribution platform with respect to News Corp.'s general national and non-sports regional programming. Accordingly, we adopt the Applicants' proposed conditions and decline to impose additional program access restrictions for this programming.

125. In enacting the program access provisions of the 1992 Cable Act. Congress found that extensive vertical integration between cable operators and cable programming vendors created an imbalance of power, both between cable operators and programming vendors and between incumbent cable operators and their multichannel competitors.[364] Congress determined that this imbalance of power limited the development of competition among MVPDs and limited consumer choice.[365] Congress expressed its concern that unaffiliated MVPDs faced difficulties gaining access to programming required to provide a viable alternative to cable. Congress found that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators.[366] In response, Congress imposed

[359] *Id.* at 64-66. ACA, JCC and NRTC also support a program access condition that does not sunset with the program access rules. ACA Comments at 19; JCC Comments at 65; NRTC Petition at 20-21.

[360] EchoStar Petition at 63-64.

[361] Reply at 48.

[362] *Id.* at 61.

[363] *Id.* at 61.

[364] 1992 Cable Act § 2(a)(2).

[365] *Id.*

[366] 1992 Cable Act § 2(a)(5).

specific conduct restrictions, including limits on exclusive contracts, to ensure market entrants could gain access to all vertically integrated satellite cable programming.[367] The competitive concerns addressed through the program access statute are similar to many of the concerns expressed by commenters regarding fair and non-discriminatory access to News Corp.'s cable programming. That is, Congress essentially recognized that access to all vertically integrated satellite cable programming on non-discriminatory terms and conditions was needed by all MVPDs and that until competitive conditions significantly altered, the Commission must enforce prohibitions on unfair and discriminatory terms and conditions of carriage. Because Congress' focus at the time was the market power in incumbent cable operators, it additionally imposed a prohibition on exclusive carriage arrangements among cable operators and vertically integrated satellite cable programming vendors.

126. In its 2002 examination of whether to permit the exclusivity prohibition to sunset, the Commission reiterated that "access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable in the marketplace," and that "failure to secure even a portion of vertically integrated programming would put a nonaffiliated cable operator or MVPD at a significant disadvantage *vis-à-vis* a competitor with access to such programming." [368] In addition, the Commission observed that "cable programming – be it news, drama, sports, music or children's programming -- is not akin to so many widgets," and explained that complete loss of access to certain highly popular programming networks may harm the foreclosed unaffiliated competitor in the marketplace.[369] The Commission explained, "there is a continuum of vertically integrated programming, ranging from services for which there may be substitutes (the absence of which from a rival MVPD's program lineup would have little impact), to those for which there are imperfect substitutes, to those for which there are no close substitutes at all (the absence of which from a rival MVPD's program lineup would have a substantial negative impact).[370] The Commission concluded that despite the progress made in the last ten years in terms of the availability of cable programming, "a considerable amount of vertically integrated programming in the marketplace today remains "must have" programming to most MPVD subscribers," such that the program access rules, including particularly the exclusivity provision, continue to be necessary to prevent anticompetitive foreclosure of access to all of the vertically integrated satellite programming covered by the rules.[371] Further, although the Commission recognized that "certain programming services, such as sports programming, or marquee programming, such as HBO, may be essential and for practical purposes, 'must haves' for program distributors and their subscribers," it recognized "the difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition." The Commission therefore declined to narrow the scope of the exclusivity prohibition to apply only to certain types of programming that may be considered "essential programming services."[372]

[367] *See* 47 U.S.C. § 548.

[368] *Program Access Order*, 17 FCC Rcd at 12138 ¶ 32.

[369] *Program Access Order*, 17 FCC Rcd at 12139 ¶ 33.

[370] *Program Access Order*, 17 FCC Rcd at 12139 ¶ 33.

[371] *Program Access Order*, 17 FCC Rcd at 12139 ¶ 33.

[372] *Program Access Order*, 17 FCC Rcd at 12156 ¶ 69.

127. *Permanent Foreclosure.* We note at the outset that all of News Corp's satellite cable programming networks are currently covered by the non-discrimination and unfair practices prohibitions in the program access rules, and will continue to be subject to the rules based on the proposed ownership structure of the post-transaction entity.[373] News Corp. meets the definition of a "satellite cable programming vendor in which a cable operator holds an attributable interest" due to attribution of Liberty Media's interest in News Corp.[374] Some of News Corp's regional sports networks are also subject to the program access rules based upon either Liberty Media's or another cable operator's direct ownership interest.[375] The rules prohibit permanent foreclosure and overt discrimination in pricing of satellite cable programming, thus addressing outright concerns raised by EchoStar and others regarding continued access to News Corp.-owned or controlled national and non-sports regional cable programming. Indeed, as the Commission observed in its 2002 review, that "there [has been] little direct evidence of anticompetitive foreclosure of access to vertically integrated programming" in the ten years following enactment of the program access rules.[376] In addition, several other specific concerns raised by commenters are addressed explicitly by News Corp.'s offered program access commitments, such as a prohibition on satellite exclusives for News Corp. programming. To ensure that the access and non-discrimination requirements of the program access rules will continue to apply to News Corp.'s national and regional cable programming, and to obtain the additional protections encompassed by the Applicants' related commitments, we adopt the following conditions proposed by Applicants:

- News Corp. will not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD and will continue to make such services available to all MVPDs on a non-exclusive basis and nondiscriminatory terms and conditions.[377]

- DirecTV will not enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder.[378]

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[373] This includes News Corp.'s satellite-delivered regional sports networks. We address those programming assets separately because, as described in the next section, in contrast to our findings here with respect to national and non-sports regional programming, we find that News Corp. has significant market power with respect to regional sports programming the will be increased by the transaction, requiring remedies in addition to those provided by the program access rules and the Applicants' offered commitments.

[374] Under the program access attribution rules, an ownership interest greater than 5% is cognizable. *See* 47 C.F.R. § 501, note 2(a). Liberty Media owns 17.6% of News Corp and 100% of Liberty Cablevision of Puerto Rico which has 119,000 subscribers.

[375] For example, Comcast has a 50% ownership interest in Fox Sports Net New England.

[376] *Program Access Order*, 17 FCC Rcd at 12135 ¶ 25.

[377] In committing not to offer its programming services on an exclusive basis, News Corp. voluntarily foregoes the right enjoyed by all other vertically integrated programmers to seek approval of an exclusive programming contract under the public interest standard established in 47 U.S.C. § 548(c)(4).

[378] "Affiliated Program Rights Holder" includes (i) a program rights holder in which News Corp. or DirecTV holds a non-controlling "Attributable Interest" (as determined by the FCC's program access attribution rules); and (ii) a program rights holder in which an entity holding an non-controlling Attributable Interest in News Corp. or DirecTV holds an Attributable Interest, provided that News Corp. or DirecTV has actual knowledge of such entity's Attributable Interest in such program rights holder. Liberty Media is the only entity currently covered by (continued....)

- As long as Liberty Media holds an Attributable Interest in News Corp., DirecTV will deal with Liberty Media with respect to programming services it controls as a vertically integrated programmer subject to the program access rules.[379]

- DirecTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (e.g., NFL Sunday Ticket)[380]

- Neither News Corp. nor DirecTV (including any entity over which either exercises control) shall unduly or improperly influence: (i) the decision of any Affiliated Program Rights Holder to sell programming to an unaffiliated MVPD; or (ii) the prices, terms and conditions of sale of programming by any Affiliated Program Rights Holder to an unaffiliated MVPD.

- These commitments will apply to News Corp. and DirecTV for as long as the FCC deems News Corp. to have an Attributable Interest in DirecTV and the FCC's program access rules applicable to satellite cable programming vendors affiliated with cable operators are in effect (provided that if the program access rules are modified these commitments shall be modified to conform to any revised rules adopted by the FCC).[381]

128. We reject as unwarranted the suggestion of certain commenters that the exclusivity ban should continue to apply to the post-transaction entity even if in the program access exclusivity ban sunsets for the rest of the industry.[382] To let the ban sunset, the Commission must find that there is sufficient competition in the MVPD market so that the exclusivity prohibition is no longer necessary.[383] If MVPD competition is found to be sufficient, then there is no need to restrain the Applicants alone in the manner suggested. Additionally, we address the concern raised by NRTC and RCN regarding an appropriate enforcement mechanism by clarifying that, for enforcement purposes, aggrieved MVPDs may bring program access complaints against Applicants using the procedures found at Section 76.1003 of the Commission's rules.[384]

(Continued from previous page)
this definition. Nonetheless this commitment goes beyond the program access rules as DBS operators are not included within the exclusivity prohibition. *See* 47 C.F.R. § 1002(c).

[379] This condition would only be of significance in the event either Applicant or Liberty Media otherwise ceases to be subject to the Commission's program access jurisdiction.

[380] *See* Discussion *infra* at Section VII.D. concerning exclusive arrangements with unaffiliated programmers.

[381] Although *most* of the program access rules will remain applicable unless terminated by Congress, Section 76.1002(c), the prohibition on exclusive contracts, sunsets on October 5, 2007 unless the Commission finds that the prohibition continues to be necessary to protect competition in the distribution of video programming. *See* 47 C.F.R. § 76.1002(c)(2). In the year prior to the sunset, the Commission will conduct a proceeding to evaluate the circumstances in the video programming marketplace.

[382] ACA Comments at 19; EchoStar Petition at 65.

[383] See 47 U.S.C. 548(c)(5).

[384] NRTC Petition at 21; RCN Comments at 9-10; See also 47 C.F.R. 76.1003.

129. *Temporary Foreclosure.* As we have found, the program access rules, together with the offered conditions, will prohibit permanent foreclosure as well as overt discrimination in the prices News Corp. charges for national and non-sports regional cable programming. Commenters express concern, however, that the proposed conditions will be inadequate to prevent News Corp. from uniformly raising programming prices to unreasonable levels. Our analysis, however, indicates that such a result is only achievable for programming in which News Corp. has significant market power. As we noted earlier, video programming in general, and cable programming in particular, are differentiated products, for which demand and substitutability may vary greatly across a continuum.[385] The record does not support a conclusion that either News Corp. or other MVPDs consider News Corp.'s national and non-sports regional programming networks to be so highly desired by subscribers that they will switch MVPD providers to obtain it if temporarily foreclosed from accessing it on their incumbent providers' systems.[386] Nor does the record contain any other evidence that consumers value this type of programming to such an extent that they will change MVPDs rather than substitute different programming carried by their chosen MVPD. Rather, we find that News Corp.'s general entertainment and news cable programming networks participate in a highly competitive segment of programming market with available reasonably close programming substitutes.[387]

130. Further, we find no evidence in the record that News Corp. has attempted to temporarily foreclose an MVPD's access to its national and non-sports regional programming in order to achieve better carriage conditions or higher rates. To the contrary, in most, if not all, instances the record indicates that News Corp. has used negotiations for carriage of other programming that does have significant market power for which there are no close substitutes – its regional sports networks and local broadcast television station programming -- to ensure carriage of many of its general entertainment and other cable networks.[388] **[REDACTED]**.[389] There is no evidence in the record to suggest that News Corp.'s acquisition of a controlling interest in DirecTV is likely to give it any additional market power with respect to carriage negotiations for its national and non-sports regional cable programming networks. Consequently, we find that News Corp. could not effectively use a controlling interest in DirecTV to increase rates for national and non-sports regional programming to levels above those that would exist absent the transaction.

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[385] See supra at para 59; See also *Program Access Order*, 17 FCC Rcd 12138 ¶ 33.

[386] As discussed below, we reach a different conclusion regarding the amount of market power News Corp. possess regarding its RSNs.

[387] The *2002 Video Competition Report* reported 208 satellite delivered national programming networks. *2002 Video Competition Report*, 17 FCC Rcd at 26960 ¶ 59. The success of the Fox News Channel demonstrates the competitiveness of the general cable programming segment. Launched in 1996, the network was able to overtake long standing ratings leader CNN, and since 2002 has since consistently finished first among cable news channels in total day ratings. *See* Statement of Rupert Murdoch, Chairman and CEO, News Corp. Before Senate Commerce Comm. (May 22, 2003).

[388] Indeed, the record indicates that News Corp. has achieved unparalleled levels of distribution for some of its cable networks as a direct result of its ability to require carriage of these networks as a condition of access to its regional sports and broadcast television signals. *See* JCC Comments at 21-29. *See also* ACA Comments in MB Docket No. 03-172 (*Video Competition Report)* at 6.

[389] **[REDACTED]**.

131. We therefore decline to adopt suggestions from commenters and opponents that: (a) are already addressed by the additional conditions Applicants have offered; (b) intended to remedy situations unrelated to this transaction; (c) calculated to remedy harms that we have determined are unlikely to occur; (d) would not adequately remedy the likely harms of the transaction; (e) single Applicants out for special treatment unwarranted by any likely adverse consequences of the transaction; or (f) would leave Applicants in a worse position following the transaction than they are today.[390] The goal of our license transfer application review process is to allow parties to realize the economic efficiencies associated with the transaction, while ensuring that any harms resulting from the license transfer are mitigated and some portion of the benefits of the transfer are passed on to the public. An application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. Those issues are best left to broader industry-wide proceedings.

132. In conclusion, we believe as a general matter that the Commission's program access rules are satisfactory to address any imbalance of power between News Corp. and competing MVPDs with respect to national and non-sports regional cable programming networks. Likewise, our acceptance of the offered conditions ensures that any imbalance that may exist between DirecTV and some of its competitors in the MVPD market is remedied in the same manner as with vertically integrated MVPDs that use cable technology to deliver their product to consumers, regardless of the effect of any post-closing changes in the corporate relationships between News Corp. and its various cable programming affiliates. In contrast, as described below, the record indicates that News Corp. has considerable market power with respect to its regional sports networks and its local broadcast station signals, that the transaction is likely to increase its incentive and ability to use that market power to obtain substantially greater fee increases and other carriage concessions for such programming than it can today, and that additional remedial actions are therefore warranted for such video programming.

b. Access to Regional Sports Cable Programming Networks

(i) Background

133. Since the Commission first began tracking regional cable programming networks in 1998,[391] it has repeatedly recognized the importance of regional sports programming to MVPD offerings.[392] This acknowledgement is based, in part, on the finding that for such programming, there are

[390] For example, EchoStar proposes that the Applicants be prevented from sharing information internally; that program access requirements be extended to apply to Liberty Media's programming assets and to programming that Congress did not choose to subject to the rules and that News Corp. be limited to offering programming at published rates that are preapproved by the Commission. *See* EchoStar Petition at 64. Pegasus suggests that we impose specialized corporate governance rules and FCC filing requirements on all contracts between Fox and DirecTV for a period of five years. *See* Pegasus Sept. 30, 2003 Ex Parte. Cablevision asks that we revise the program access commitments to prevent News Corp. from using "sweetheart deals" with DirecTV to force higher prices on all other MVPDs. Cablevision Comments at 2, 30.

[391] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 13 FCC Rcd 24284) (1998) ("*1998 Video Competition Report*").

[392] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 17 FCC Rcd 1244, 1314 ¶ 171 (2002) ("*2001 Video Competition Report*") (finding that "regional sports programming continues to be an important segment of programming for all MVPDs"); *Program Access Order,* 17 FCC Rcd at 12138 ¶ 32 (finding no readily acceptable substitute for RSN programming).

no readily acceptable close substitutes.[393] The basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: regional sports networks ("RSNs") typically purchase exclusive rights to show sporting events and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game.[394] The Commission's extension of the sunset date for the exclusivity program access rules last year was intended, in part, to ensure that competing MVPDs would have continued access to the satellite-delivered regional sports programming owned by vertically integrated cable operators.[395] We also have long recognized that the terrestrial distribution of programming—particularly RSN programming—by vertically integrated cable operators could competitively disadvantage competing MVPDs if they were denied access to the terrestrially delivered programming.[396]

134. News Corp. is a major owner of RSNs. It owns or has an attributable interest in 19 RSNs, 12 of which it manages, which reach 79 million television households.[397] According to NCTA's *Cable Developments 2003*, those RSNs produce over 4,700 live events each year, and carry 65 of the 80 professional Major League Baseball ("MLB"), National Basketball Association ("NBA") and National Hockey League ("NHL") teams.[398] RSNs wholly owned by News Corp. carry 45 of the 80 professional teams,[399] and thus controls a significant amount of professional sports programming on regional sports networks.

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[393] *Program Access Order*, 17 FCC Rcd at 12148-49 ¶ 54 ("the incentive for the vertically integrated regional programmer to foreclose programming, is further increased in situations in which there is no readily acceptable substitute for the programming, such as regional sports programming").

[394] "Regional sports programming in particular, has been and continues to be, an important segment of programming for all video programming providers. According to a 2000 survey, between 40 and 48 percent of cable subscribers would be less likely to subscribe to cable service if it lacked local sports. Cable overbuilders have frequently noted that access to sports programming is so essential to the success of a cable system that many operators will pay exorbitant prices and agree to entertain other less attractive business arrangements just to obtain it." FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 124 (citing *2000 Video Competition Report*, 17 FCC Rcd at 1354-1356; *1998 Video Competition Report*, 13 FCC Rcd at 24298-99 and 24380-81).

[395] *Program Access Order*, 17 FCC Rcd at 12147-49 ¶¶ 52-55 (finding that vertically integrated MSOs continue to have an incentive and ability to withhold access to their affiliated RSNs).

[396] *E.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1252 ¶ 14 (2002) ("*2002 Video Competition Report*"); *2001 Video Competition Report*, 17 FCC Rcd at 1252 ¶ 14; *2000 Video Competition Report*, 16 FCC Rcd at 6013 ¶ 15 (2001); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 15 FCC Rcd 978, 986 ¶ 16 (2000) ("*1999 Video Competition Report*"); *Program Access Order*, 17 FCC Rcd at 12139 n.107 (citing data provided by DirecTV and EchoStar indicating that they have significantly lower subscribership in Philadelphia as compared to other large cities and noting that DirecTV's and EchoStar's claim that "this is directly attributable to their inability to access Comcast SportsNet").

[397] *See* Application at 26.

[398] NCTA, *Cable Developments 2003* at 83.

[399] JCC Comments at 38 (citing www.newscorp.com/management/fsn.html).

(ii) Positions of the Parties

135. Applicants contend that it would be unprofitable for News Corp. to foreclose access to its RSNs. They assert that DirecTV's maximum share of any regional market served by one of the News Corp.'s RSNs is less than 13%, and that denying programming to competing MVPDs would require News Corp. to forego programming sales to at least 87% of each regional market.[400] They further argue that the loss in programming revenues from competing MVPDs that would result from a strategy of foreclosure could not be offset by any profits it might earn as a minority owner of an MVPD with a relatively small market share.[401] Applicants further assert that much of its programming is jointly owned by other parties, who could not benefit from, and therefore would not tolerate, such a strategy.[402] Applicants also maintain that, even if a foreclosure strategy made economic sense, the program access rules in unison with their proposed program access commitments require them to make all existing and future programming available on a nondiscriminatory basis to all MVPDs and prohibit DirecTV from entering into exclusive deals with affiliated programmers.[403]

136. Competing MVPDs consider RSNs critical to any MVPD offering.[404] They contend that, if they cannot offer the "must-have" programming which is controlled by News Corp., such as News Corp.'s RSNs, they will be unable to compete with DirecTV.[405] JCC observe that the "harm to the competitive MVPD . . . is further increased in situations in which there is no readily acceptable substitute for the programming, such as regional sports programming."[406] JCC also assert that News Corp. Chairman Rupert Murdoch has "long described sports programming as his 'battering ram' to attack pay television industries around the world," and argue that acquiring DirecTV will give News Corp. the ability to dictate the terms and conditions of carriage for such marquee programming.[407] In addition, JCC cite reports that News Corp. has raised the cost of its Fox Sports content by more than 30% in one year for some systems and has already demonstrated its willingness to withhold its RSNs' programming signal from cable operators unwilling to adhere to its demands for higher carriage fees.[408] RCN argues that lack of access to local sports programming works particular hardships upon competitive MVPDs, citing results of surveys conducted for it by professional polling organizations as confirming "the vital importance of local sports programming to a cable operator's success: the data show that some 40-48% of cable subscribers would be less likely to subscribe to cable service if it lacked local sports

[400] Applicants' Reply, CRA Analysis ¶ 46.

[401] *Id.*

[402] Applicants' Reply, Lexecon Analysis ¶ 62.

[403] See Application at 54.

[404] JCC Comments at 34-44; ACA Comments at 16, 18-21; EchoStar Petition at 22-24, 31; RCN Comments at 3-4.

[405] EchoStar Petition at 22-23; ACA Comments at 18; JCC Comments at 55.

[406] *Id.* (citing *Program Access Exclusivity Report and Order*, 17 FCC Rcd at 12145 ¶ 47).

[407] JCC Comments at 34 (citing David D. Kilpatrick, *Murdoch's First Step: Make Sports Fans Pay*, N.Y. Times, Apr. 14, 2003, at C1).

[408] JCC Comments at 39-42 (noting three disputes in which a Fox RSN was withdrawn form cable subscribers homes: 1) Fox Sports North to 150,000 Time Warner customers, 2) Fox Sports' Sunshine Network to almost 2 million Time Warner customers, and 3) certain sporting events on Fox Sports Net West).

programming and, in one survey, an additional 12% of subscribers said they were not sure whether the absence of local sports programming would impact their decision whether to take the service."[409] According to RCN, in rough terms this indicates that a competitive MVPD that does not have local sports programming will have little or no chance of winning as subscribers as much as 40-70% of its potential subscriber base, with the result being that without local sports, RCN must try to reach a break-even penetration rate of 30% of the market from a potential subscriber base that only includes 30-60% of the market to begin with.[410]

137. JCC contend that DirecTV already uses its sports programming offerings as an important marketing tool and a competitive strategy.[411] Further, they argue that DirecTV siphons customers away from cable every time a cable MSO fails to come to terms with an RSN.[412] After the transaction, JCC maintains, this increase in DirecTV subscriptions from customers who regard RSNs as "must have" programming will generate additional profits for News Corp, thus increasing News Corp.'s incentive to precipitate carriage disputes over RSNs with rival MVPDs.[413] JCC also claim that by "picking and choosing its targets and timing with care, News Corp. would also send powerful signals to the marketplace," which is likely to cause other competing MVPDs simply to accept News Corp.'s price increases.[414] Commenters claim that the increased price of News Corp.'s RSN programming is likely to harm consumers through higher cable rates in the short term, and diminished competition in the MVPD marketplace in the long term.[415] Commenters also contend that despite the program access rules, News Corp's inflexibility over rates, terms and conditions of carriage of its RSNs and its willingness to withhold those networks from cable operators if a carriage agreement cannot be reached will be exacerbated by the ability to distribute programming via DirecTV.[416] Additionally JCC argue, News Corp. may insist on bundling carriage of RSNs with other newer or less desirable programming with the result that the "battering ram" of News Corp.'s sports programming delivers a "one-two" punch: higher prices and mandatory carriage of new – and expensive – programming.[417] Absent intervention from the Commission, they claim, News Corp.'s acquisition of a controlling interest in DirecTV can be expected to lead to higher prices and more high-profile "showdown" negotiations such as those that have occurred

[409] *See* Letter from Kathy L. Cooper and L. Elise Dieterich, Swidler, Berlin, Shereff, Friedman, LLP, to Marlene H. Dortch, Secretary, FCC (Oct. 24, 2003) ("RCN Oct. 24, 2003 Ex Parte), Attachment at 2-3.

[410] *See* RCN Oct. 24, 2003 Ex Parte Attachment at 3.

[411] JCC Comments at 40; EchoStar at 22-24.

[412] JCC Comments at 40. *See also* Letter from Pantelis Michaelopoulous, Steptoe & Johnson, to Marlene H. Dortch, Secretary, FCC (Dec. 15, 2003) at 4-5 ("EchoStar Dec. 15 Ex Parte") (describing increased churn among its New York DMA subscribers after it failed to reach a carriage agreement with YES Network).

[413] JCC Comments at 42-43.

[414] *Id.*

[415] JCC Comments at 4, 42-43 and Exhibit A, William P. Rogerson, *An Economic Analysis of Competitive Effects of the Takeover of DirecTV by News Corp.* ("Rogerson Analysis") at 4, 27; Letter from Chris Murray, Legislative Counsel, Consumers Union to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003) ("Consumers Union Sept. 23, 2003 Ex Parte") at 3-5; ACA Reply Comments at 5-7.

[416] JCC Comments at 34; ACA Comments at 18.

[417] JCC Comments at 40.

with negotiations over Fox Sports Net North in January 2003 and Fox Sports Net West in 2001.[418]

138. JCC provide an economic analysis of the competitive effects of the transaction authored by William Rogerson ("Rogerson Analysis"), which finds that RSNs are "must have programming" for which no good substitute exists.[419] According to Rogerson, this means that News Corp. could harm rivals by pursuing exclusionary or cost-raising strategies with respect to this programming.[420] Examining several recent incidents where the programming supplier withdrew sports programming from an MVPD during carriage negotiations, the Rogerson Analysis concludes that significant numbers of subscribers leave MVPDs that no longer offer local sports programming.[421]

139. Applicants respond with an economic analysis by Charles River Associates, Inc. (the "CRA Analysis") that supports their argument that it would not be profitable for post-transaction News Corp. to withhold RSN signals.[422] The CRA Analysis concludes that the costs of permanently foreclosing competing MVPDs from access to News Corp.'s RSN programming outweigh the benefits of such a strategy.[423] Specifically, the CRA Analysis finds that, in order for permanent foreclosure to be a profitable strategy, DirecTV would have to more than double its subscribership in the combined RSN footprint.[424] Applicants contend that such subscribership increases are implausible.[425]

140. In support of their claim, Applicants describe the effects of the loss of Yankee games by Cablevision following the formation of the Yankees Entertainment and Sports ("YES") Network.[426]

[418] JCC Comments at 42-43.

[419] JCC Comments, Rogerson Analysis at 13-16. JCC submitted a total three exhibits prepared by William P. Rogerson. *See* Letter from Bruce D. Sokler, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Aug. 4, 2003) ("JCC Aug. 4 Ex Parte") Attachment, William P. Rogerson, *A Further Economic Analysis of The News Corp. Takeover of DirecTV* ("Rogerson Analysis II"); Letter from Fernando Laguarda, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003), ("JCC Sept. 23, 2003 Ex Parte), William P. Rogerson, *Economic Analysis of The Takeover of DirecTV by News Corp. – Presentation to the FCC* (Sept. 23, 2003) ("Rogerson Analysis III").

[420] JCC Comments, Rogerson Analysis at 12-13.

[421] *Id.* at 15-16.

[422] Applicants' Reply, Exhibit B Steven C. Salop *et al* of Charles River Associates, Inc., *News Corporation's Partial Acquisition of DirecTV: Economic Analysis of Vertical Foreclosure Claims. See also* Applicants' Reply, Exhibit A, Lexecon, Inc., *Economic Analysis of the News Corp./DirecTV Transaction* ("Lexecon Analysis")

[423] Applicants' Reply, CRA Analysis at ¶¶ 44-67.

[424] Applicants' Reply at 28 (citing CRA Analysis at ¶¶44-51).

[425] Applicants' Reply at 28-29.

[426] YES entered into carriage agreements with DirecTV, Time Warner, and a number of other MSOs prior to the start of the 2002 baseball season. John Brennan, *New Jersey Official Raise Stakes in Battle with Cable-Television Firm*, THE RECORD (Apr. 30, 2002). EchoStar and Cablevision, which had both carried MSGN programming in 2001, did not reach agreements with YES, however, and thus could no longer offer New York Yankees games in 2002. *See RSNs: Keeping it Local*, THE BRIDGE (Aug. 2003), available at: http://www.cabletoday.com/pubs/bridge/the_bridge_archive/bridge082003.pdf (visited Sep. 11, 2003). YES and Cablevision later reached a carriage agreement. Harry Berkowitz and Dan Janison, *Victory for Yanks Fans:* (continued....)

According to the Applicants, Cablevision lost just 30,000 subscribers—1% of its overall subscriber base—as a result of its inability to carry Yankee games during the 2002 season, while DirecTV's subscribership in the affected region increased by only a few percentage points—far less than the increases in market share that Applicants contend are required for RSN foreclosure to be profitable.[427] The second example cited by Applicants involved a carriage dispute between a Fox RSN and a Time Warner cable system in Minnesota, where, according to Applicants, Time Warner reported a loss of only 200 of its 180,000 subscribers in the region during the two months that it lacked the programming.[428] Finally, Applicants cite Comcast's ongoing refusal to make its RSN in Philadelphia available to DirecTV or EchoStar. Applicants contend that, although DirecTV has not grown as quickly in this market as in others, neither DirecTV nor EchoStar has exited the market, and, in fact, both DBS operators have continued to grow.[429]

141. In response to claims that News Corp. will increase prices for its affiliated RSN programming, Applicants assert that, like foreclosure, such a strategy would be contrary to News Corp.'s economic interest.[430] According to Applicants, News Corp. cannot increase the price of RSN programming without risking a loss of subscribers, and vertical integration with DirecTV will not change this.[431] Claiming that News Corp.'s fees for RSN programming already maximize the profits that it can earn on the programming,[432] Applicants argue the transaction actually will reduce News Corp.'s incentive to raise prices, because News Corp. would lose revenue from programming fees when cable operators refuse to pay the higher prices and stop carrying the RSNs, and DirecTV would lose money due to the increased RSN prices.[433] Applicants further contend that opponents' foreclosure analysis fails to take into account the downward pressure on prices associated with the transaction, such as elimination of double marginalization and other efficiencies.[434] Finally, Applicants claim that regardless of the transaction, News Corp. could achieve the benefits of foreclosure of a RSN through the use of contracts.[435]

(Continued from previous page)
Cablevision Agrees to Carry YES Network in Time for Opener, NEWSDAY (Mar. 13, 2003).

[427] Applicants' Reply at 29.

[428] Applicants' Reply at 29 (citing Judd Zulgad, *FSN, Time Warner Struggled to Agreement,* STAR TRIBUNE at 6C (Mar. 14, 2003)).

[429] Applicants' Reply at 30. In response to claims that Applicants would have a greater incentive and ability to withhold programming from smaller cable operators, Applicants state that although subscriber losses to the RSN would be small, so would subscriber gains to DirecTV. Applicants' Reply at 31.

[430] Applicants' Reply at 32.

[431] Applicants' Reply at 32.

[432] Applicants' Reply at 33 (citing CRA Analysis at ¶¶ 92-94).

[433] Applicants' Reply at 33 (citing CRA Analysis at ¶¶ 95-100).

[434] Applicants' Reply at 34.

[435] Applicants' Reply at 24; *see also* Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M. Epstein, Latham & Watkins, and Richard E. Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Sept. 8, 2003) ("Applicants' Sept. 8, 2003 Ex Parte"), Exhibit 2, Lexecon, Inc., *Response to William P. Rogerson* (continued….)

142. JCC criticize the Applicants' for failing to adequately grapple with the key argument that the transaction increases the likelihood that News Corp., armed with the increased bargaining power its interest in DirecTV will give it, will withhold – or threaten to withhold – programming from MVPDs in a few select markets for only a short period of time in order to obtain additional pricing power and negotiating leverage.[436] JCC use the data and methodology from the CRA Analysis to support their temporary foreclosure theory. Rogerson, on behalf of JCC, notes that programmers, including News Corp., currently use the threat of withdrawing programming as a lever to negotiate higher programming prices from MVPDs. Any change in circumstances, according to Rogerson, that lowers the cost to News Corp. of withdrawing programming will increase the credibility of its threat to withdraw programming and therefore will increase News Corp.'s ability to force MVPDs to accept higher programming prices. News Corp.'s acquisition of control of DirecTV reduces the cost to News Corp. of withdrawing programming form rivals of DirecTV because: (i) when News Corp. withdraws programming from rival MVPDs, some customers will switch to DirecTV and DirecTV will earn profits on the customers who switch; and (ii) these profits offset the cost to News Corp. of withdrawing programming and therefore reduce the net cost of withdrawing programming. As Rogerson notes, "this will make the threat of withdrawing programming more credible and thus allow News Corp. to bargain for higher prices."[437] Moreover, Rogerson concludes, the threat to competition and consumers by temporary withdrawals of "must have" programming will "be particularly serious in less dense regions of the country served by small and medium sized cable operators [because] raising the price of programming from these firms is more likely to drive them entirely out of the market," and this in turn will increase News Corp.'s incentive to use its bargaining power in this manner, with the potential result of significant price increases.[438] ACA argues that these conclusions confirm that smaller and medium sized cable operators outside urban areas of the country are at particular risk from the combination of News Corp.'s programming and DirecTV's distribution assets, and that the Applicants' proposed program access undertakings offer smaller cable operators no protection, because, as Rogerson and the Applicants acknowledge, the proposed conditions expressly allow quantity discounts and therefore place very little constraint on the prices that News Corp. could charge smaller cable systems.[439]

143. According to Rogerson's calculations, temporary withdrawals of programming by News Corp. are likely to not only partially offset losses during the blackout periods for RSN programming, but are "very likely to be profitable for News Corp. after it acquires control of DirecTV. These temporary withdrawals will directly harm consumers and also provide News Corp. with even more bargaining leverage in its negotiations over programming prices with rival MVPDs."[440] Additionally, Rogerson finds, using data contained in the CRA Analysis, that if News Corp. temporarily withholds an RSN from

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and Daniel L. Rubinfeld ("Lexecon Analysis II") at 66. Opponents counter that it would be difficult for independently owned and controlled firms to negotiate, exchange necessary information, and monitor compliance with the complex contracts that would be required to efficiently apportion the benefits of temporary foreclosure. Rogerson Analysis II at 22-23.

[436] JCC Aug. 4, 2003 Ex Parte at Rogerson Analysis II.

[437] JCC Aug. 4, 2003 Ex Parte at 15, Rogerson Analysis II at 43-44.

[438] JCC Aug. 4, 2003 Ex Parte at 15, Rogerson Analysis II at 4.

[439] ACA Comments at 5-7; ACA Oct. 17, 2003 Ex Parte at 1, 10.

[440] JCC Aug. 4, 2003 Ex Parte at 15, Rogerson Analysis II at 43-44.

a targeted MVPD, it breaks even economically if less than ***[REDACTED]*** *of that MVPD's subscribers* migrate to DirecTV.[441] As a consequence, Rogerson concludes, News Corp. will -- because of the transaction – be able to bargain for higher programming prices than it would otherwise, and consumers will suffer as these increased input costs are passed along to them by their MVPDs.[442]

144. JCC argue accordingly that News Corp. would not need to achieve "enormous increases in subscribership or pricing" using DirecTV to make temporary withholdings of must-have programming a viable and profitable strategy.[443] They argue that: (1) internal News Corp. documents show that News Corp. already engages in temporary programming withdrawals of must-have programming, such as RSNs; (2) acquiring control over DirecTV will reduce the costs of such tactics to News Corp. and therefore create upward pressure on programming prices; and (3) News Corp. recognizes the value of effectuating a service interruption in a particular market in order to "send a message" to distributors in other markets about the costs of resisting its fee and carriage demands.[444] They claim that the transaction changes the present "balance of terror" between programmers and MVPD distributors.[445] JCC explain that News Corp. currently does not know whether the loss of subscription and advertising revenue resulting from a temporary withdrawal of RSN or FOX programming will be recouped via higher carriage fees gained from that distributor (and others in adjacent markets) once the impasse is resolved. According to JCC, the acquisition substantially reduces, if not eliminates, the pre-transaction risks to News Corp. of failing to conclude a carriage agreement with a cable operator or other MVPD for "must have" programming.[446] JCC emphasize that the key competitive concern is that this transaction will enable News Corp. to use temporary foreclosure and/or the threat of such foreclosure as a tactical "weapon" to obtain supra-competitive prices for Fox programming from all retail distributors, and that those prices will ultimately be borne by consumers.[447]

145. Applicants respond that reliance of the JCC upon selective portions of internal News Corp. documents is misplaced, and that News Corp. does not engage in a temporary foreclosure negotiation strategy with respect to its RSNs.[448] Rather, Applicants claim that News Corp. seeks "maximum distribution of its programming."[449] Applicants maintain that in nearly every instance

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[441] JCC Sept. 23 Ex Parte, Rogerson Analysis III at 11.

[442] JCC Sept. 23 Ex Parte; Rogerson Analysis III at 2.

[443] Letter from Bruce Sokler, Mintz, Levin, et al. to Marlene Dortch, Secretary, FCC (Nov. 5, 2003) ("JCC Nov. 5, 2003 Ex Parte").

[444] *Id.*

[445] JCC reiterate their claim that News Corp. will use DirecTV as a negotiating weapon. *Id. See also* ACA Comments at 18.

[446] *Id.* Similarly NRTC notes that News Corp. could threaten cable operators by using DirecTV to acquire market share. NRTC Petition at 14.

[447] *Id.* at 2; See also Consumers Union Sept. 23, 2003 Ex Parte at 3.

[448] Letter from William Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene Dortch, Federal Communications Commission (Nov. 13, 2003) ("Applicants' Nov. 13, 2003 Ex Parte").

[449] *Id.* at 2.

involving renewal of an RSN, the parties have been able to reach an agreement without service interruptions, and that temporary service interruptions have occurred only rarely during negotiations with MVPDs for Fox RSN carriage.[450] Applicants argue further that JCC fail to take into account the evidence of the actual negative effects of temporary service interruptions to News Corp., where these have occurred. Applicants claim that there is no evidence to support theories that the acquisition of a partial interest in DirecTV would materially change the relative bargaining power of News Corp. and MVPDs. In fact, Applicants argue, real-world experience with withdrawals of sports programming from cable operators in other markets (such as the Cablevision/YES dispute) demonstrates that "very little switching" of subscribers to DBS providers carrying the foreclosed programming actually occurs.[451] Finally, Applicants reiterate that temporary withholding of RSNs is unlikely to occur because News Corp. is likely to suffer significantly greater financial losses than the MVPD if the RSN signal is not carried.[452] According to the Applicants, while News Corp. will lose the subscriber fees and advertising revenues that it would have realized through carriage on the MVPD, the MVPD – able to publicize to its subscribers that the RSN signal will be restored once the carriage dispute is concluded -- suffers nothing "more than customer annoyance.[453]

146. EchoStar takes issue with the characterization of the harm inflicted on the MVPD as mere "customer annoyance," and argues that "the absence of regional sports . . . from an MVPD's package, even for a short period of time, has a debilitating effect on that distributor's ability to compete in the region in question . . . [T]he distributor would have lost existing subscribers, potential new subscribers, and would have suffered a serious reputational blow. All of these losses would be irreparable – the subscribers who departed or chose another distributor would almost certainly not come back when the programming returns."[454]

(iii) Discussion

147. We conclude that News Corp. currently possesses significant market power with respect to its RSNs within each of their specific geographic regions, and that the proposed transaction will enhance News Corp.'s incentive and ability to temporarily withhold or threaten to withhold access to its RSN programming to increase the fees it receives for the programming, over and above what it could negotiate absent the transaction, to the ultimate detriment of the public. Moreover, we find that in contrast to the situation with respect to access to national and non-sports regional programming, neither our program access rules nor Applicants' proposed program access commitments are sufficient to protect against these likely transaction-specific harms.

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[450] *Id.* at 2.

[451] *Id.* at 4.

[452] Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M. Epstein, Latham & Watkins, and Richard E. Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Dec. 11, 2003) ("Applicants' Dec. 11 Ex Parte"), Attachment at 1; Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M. Epstein, Latham & Watkins, and Richard E. Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Dec. 12, 2003) ("Applicants' Dec. 12 Ex Parte"), Attachment at 1.

[453] Applicants' Dec. 11 Ex Parte, Attachment at 1.

[454] EchoStar Dec. 15 Ex Parte at 2.

148. At the outset, we agree with commenters that there are no reasonably available substitutes for News Corp.'s RSN programming and that News Corp. thus currently possesses significant market power in the geographic markets in which its RSNs are distributed. We base these conclusions, in part, on the limited number of teams and games of local interest that are available and **[REDACTED]**,[455] and on our economic analysis, described below, of the effects of temporary withdrawals of such programming from MVPD subscribers. An additional feature of RSN programming that sets it apart from general entertainment programming is the time-sensitivity of the airing of important local professional sports events, such as opening days or playoffs. As we have previously observed,[456] RSNs are comprised of assets of fixed or finite supply – exclusive rights to local professional sports teams and events – for which there are no acceptable readily available substitutes. These peculiar features of RSN programming give rise to somewhat unique competitive problems in terms of finding relatively close substitute programming in the event access that is foreclosed to rival MVPDs.

149. We also reject News Corp.'s claim that the key competitive harms associated with this transaction could be inflicted by means of contractual arrangements between the companies, and that therefore the claims are not transaction-specific.[457] To the extent that any behavior other than permanent foreclosure is at issue, it appears highly unlikely that News Corp. and DirecTV, as separate entities, could better manage and coordinate temporary withholdings than they could functioning as a single entity. Rather we agree, as JCC's expert observes, that News Corp. cannot simultaneously claim that the transaction is essential to the accomplishment of all of the beneficial efficiencies identified in their Application, while simultaneously asserting that it is completely unnecessary to the imposition of the harms identified in the record.[458]

150. Both Applicants and commenters have provided economic analyses, which rely in part on empirical data to evaluate whether News Corp., after the transaction, will engage in some form of foreclosure.[459] Applicants' analyses find that they would not profit from either permanent or temporary foreclosure.[460] Commenters' analyses, in contrast, find that Applicants will have an increased incentive and ability to temporarily withhold, or credibly threaten to withhold, access to their RSNs.[461]

151. In addition to the studies submitted by the parties, Commission staff conducted its own

[455] *See* **[REDACTED]**.

[456] *See Program Access Order*, 17 FCC Rcd at 121489 ¶ 54; FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 124 (citing *2000 Video Competition Report*, 17 FCC Rcd at 1354-1356; *1998 Video Competition Report*, 13 FCC Rcd at 24298-99 and 24380-81).

[457] Applicants' Reply at 24-26.

[458] JCC Aug. 4, 2003 Ex Parte at 10-11; Rogerson Analysis II at 22-25.

[459] *See* Applicants' Reply, CRA Analysis; JCC Comments, Rogerson Analysis I; JCC Aug. 4 Ex Parte, Rogerson Analysis II; JCC Sept. 23, 2003 Ex Parte, Rogerson Analysis III; Applicants' Sept. 8 Ex Parte, Exhibit 1, Charles River Associates, Inc., *News Corp.'s Partial Acquisition of DirecTV: A Further Economic Analysis* ("CRA Analysis II").

[460] Applicants' Reply, CRA Analysis at ¶¶ 44-67; Applicants' Sept. 8 Ex Parte, CRA Analysis II at ¶¶ 4-29.

[461] JCC Comments, Rogerson Analysis at 12-24; JCC Aug. 4, Ex Parte at Rogerson Analysis II; JCC Sept. 23 Ex Parte at Rogerson Analysis III.

economic analysis. As commenters correctly observe, the increased *ability* of an RSN owner to credibly threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow the RSN owner to extract higher prices, which are ultimately passed on to consumers. The staff's economic analysis is premised on the assumption that, if the transaction significantly enhances News Corp.'s incentive and ability to withhold signals of its RSNs by lowering the costs to News Corp. of employing such bargaining tactics, News Corp. will engage in such behavior, and that this will result in an increase of rival MVPDs' programming costs, and ultimately end-user prices. Key to determining the degree to which the transaction lowers News Corp.'s costs of engaging in temporary foreclosure is the number of subscribers that can be predicted to shift from the affected MVPD to competitor DirecTV to access the foreclosed programming, which in turn will increase the profits of the post-transaction company as a whole, over and above levels achievable under today's conditions.

152. *Permanent Foreclosure.* As discussed in greater detail in Appendix D, the technical appendix, the staff's economic analysis examined the potential profitability of both permanent and temporary foreclosure strategies for each of News Corp.'s RSNs. Based upon the staff's analysis, we agree with Applicants that a strategy of permanent RSN foreclosure, assuming that it were permissible under the rules, would be unprofitable for News Corp. and therefore unlikely to be pursued any more frequently post-transaction than it is today. We therefore do not find that permanent foreclosure of RSN programming is likely to be transaction-specific harm.

153. *Temporary Foreclosure.* We also agree with commenters who argue that a temporary foreclosure strategy is likely to be profitable to News Corp. in many instances. The staff's analysis supports the further conclusion that this increase in the profitability of temporary foreclosure to News Corp. will make the threat of withdrawing programming a more credible tactic. By employing this tactic News Corp. will be able to negotiate higher prices than it could absent its control of DirecTV. On this basis, we find it likely that temporary foreclosure will be employed more frequently following News Corp.'s acquisition of control of DirecTV than it is today, and that this would, in turn, lead to greater programming price increases to MVPDs and higher subscription prices to consumers than we would expect to find absent News Corp.'s control of DirecTV. Increased use of temporary foreclosure strategies would thus harm competition and consumers by raising rivals' costs, by amounts greater than those News Corp. could reasonably expect to gain absent the transaction, thereby causing undue increases in MVPD subscription prices.

154. The Applicants additionally argue that we should consider not only how the transaction may increase RSN programming prices due to temporary foreclosure, but also how the transaction may lead to lower programming prices. Specifically, the Applicants claim that the reduction in "double marginalization" which results from vertical integration "will create a downward incentive for News Corp.'s programming prices. . . ."[462]

155. We recognize and agree with the theoretical argument that vertical integration can reduce prices by reducing double marginalization.[463] In this case, however, the Applicants have neither attempted to quantify this benefit nor provided sufficient information for the Commission to quantify the benefit. In particular, the Applicants have not presented sufficient information concerning the marginal

[462] Applicants' Sept. 22 Ex Parte at 12. *See also* Applicants' Reply, Lexecon Analysis at 6; Applicants' Reply, CRA Analysis at 10-12 & Appendix B.

[463] We define double marginalization at para. 70, supra.

costs to News Corp. of producing various types of programming or the relevant demand elasticities for different types of programming that are necessary for the development of an estimate of the magnitude of this benefit.

156. Like the Applicants, the staff's economic analysis of the harms of permanent and temporary withholding of programming, described in the technical appendix, assumes that DirecTV's profit margin does not change following the transaction.[464] We find that, to the extent that the elimination of double marginalization and other efficiencies will increase DirecTV's profit margin on each additional customer, the incentives to engage in permanent or temporary foreclosure will be enhanced, not reduced. In the absence of any estimates of the impact of the elimination of double marginalization on the prices of News Corp. programming to other MVPDs and how this interacts with the increased incentives to withhold when DirecTV's profit margin increases due to lower programming costs, we can only conclude that the claimed economic efficiencies are insufficient to mitigate the harms we have identified.

157. The results of the staff's economic analysis suggest that a strategy of temporarily withholding RSN programming from a cable operator, but not EchoStar, would be profitable for News Corp. for a large percentage of the cable systems that carry News Corp. RSNs.[465] Specifically, if **[REDACTED]** of cable customers defect to DBS providers following a one month withdrawal of an RSN, News Corp. would find it profitable to withdraw RSN programming temporarily from cable companies serving **[REDACTED]** of RSN cable subscribers, assuming that News Corp. receives 50% of DirecTV's additional profits.[466] Under the assumptions that **[REDACTED]** of cable customers will defect to a DBS provider and that News Corp. receives 100% of DirecTV's additional profits, then News Corp. would find it profitable to temporarily withdraw RSN programming from cable companies serving **[REDACTED]** of cable RSN subscribers. In addition, based on staff's analysis, we also find it reasonable to assume that News' incentives to temporarily foreclose a RSN from EchoStar are likely to be even stronger than to foreclose from the cable operators. This occurs because, unlike the situation with cable operators where DirecTV always faces competition from EchoStar for the switching customers, when the RSN is removed from EchoStar there will be some areas where the competing cable operator will not carry the RSN and DirecTV will be the only source for the RSN. Furthermore, in those areas where DirecTV would compete with cable providers for customers defecting from EchoStar, DirecTV would likely capture a significantly greater share of the customers. As we have found previously, consumers view EchoStar and DirecTV as closer substitutes for each other than cable is for either product.[467]

[464] Appendix D at 36.

[465] As discussed in the technical appendix, staff analyzed the incentives to withhold an RSN from a cable operator but not from EchoStar for two reasons. **[REDACTED]**. In addition, staff did not examine the incentive to temporarily withhold a RSN from EchoStar because, unlike the cable companies carrying a RSN, not all of EchoStar's competitors carry the RSN. Some cable companies would not carry the RSN and subscriber switching would heavily favor DirecTV in those areas if the RSN were withdrawn for EchoStar. In areas where the cable firm does carry the RSN, subscriber switching would not be as favorable for DirecTV, and the record was insufficient to permit staff to distinguish between these two areas to calculate News Corp.'s incentive to temporarily withhold a RSN from EchoStar.

[466] *See* Appendix D at ¶ 38.

[467] *EchoStar-DirecTV HDO*, 17 FCC Rcd 20622-23 ¶¶ 162-164.